NO. 84-34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SHARON M. BARGER, MARGARET DIANE BRANDES, and VALERIE MARIA GILBERT,

Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KENT RUSSELL, ESQ.
LAW OFFICES OF KENT A. RUSSELL
3169 Washington Street
San Francisco, CA 94115
Telephone: (415) 929-8301

Counsel for Petitioners

QUESTION PRESENTED

Whether the "Group Libel Rule" denied petitioners their constitutional rights by arbitrarily denying them the right to recover damages for libel per se, solely beause petitioners were members of a "large" group including more than 25 persons.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-34

SHARON M. BARGER, MARGARET DIANE BRANDES and VALERIE MARIA GILBERT,

Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,

Respondent.

---/

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that this Court grant the petition for a writ of certiorari, seeking review of the Ninth Circuit's unpublished opinion in this case.

THE WRIT SHOULD BE GRANTED

I. The Individual's Right To Reputation Is Entitled To The Constitutional Protection Afforded By The Balancing Test Of New York Times And Its Progeny.

The sole argument advanced by respondent in opposition to petitioners' application for a writ of certiorari is that the individual's interest in reputation is allegedly devoid of any constitutional protection. This argument is grounded upon respondent's view that in Paul v. Davis, 424 U.S. 645 (1976), this Court "rejected any notion that the interest in reputation asserted in a libel action is either property or liberty protected by the Fourteenth Amendment, or is otherwise constitutionally protected." (Respondent's Brief in Opposition, p. 3.)

Petitioners certainly do not challenge this Court's holding in Paul, precluding Civil Rights actions based

upon reputational stigma alone; however, petitioners strenuously dispute respondent's contention that the individual's interest in reputation has been relegated to the constitutional graveyard by Paul v. Davis or by any other decision of this Court.

In Gertz v. Robert Welch, 418 U.S. 323 (1974), this Court expressly declined the opportunity to provide absolute protection to the press by refusing to grant the news media an "unconditional and indefeasible immunity from liability for defamation." (Gertz, supra, at p. 341.) On the contrary, applying the balancing scheme of New York Times v. Sullivan, 376 U.S. 256 (1964), this Court spurned claims that news media's need to avoid self-censorship was the "only societal value at issue" (id., at 341) and specifically rejected any absolute protection

of libel by the communications media. In so holding, the Court clearly expressed its opposition to any absolute media protection that would "requir[e] a total sacrifice of the competing values served by the law of defamation". (Ibid.)

Consequently, rather than defining the individual interest in reputation into constitutional obscurity, this Court in Gertz took the opportunity to approve Justice Stewart's view that: "The individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.'" (Gertz, supra, at p. 341.) Indeed, in language particularly pertinent to the instant case, the Gertz court noted:

> "The protection of private personality, like the protection

> of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. (Ibid.; emphasis added.)

Respondent purports to rely on Gertz, and indeed acknowledges that the states' power to enforce the law of libel is limited by the First Amendment (Respondent's Brief in Opposition, p. 4); however, ignoring the language quoted immediately above, respondent maintains that this Court's decision in Paul v. Davis served to obliterate any constitutional recognition of the interest in reputation from any source. (See underscored portion of quotation from Respondent's Brief in Opposition, p. 3, quoted at the end of the first paragraph, supra.)

Petitioners maintain that such a reading of Paul is far beyond anything

contemplated by that decision.

Initially, petitioners must point out the obvious: that Paul was not a libel case and did not in any sense involve a balancing of constitutional interests under the New York Times test; but rather was a case concerned solely with the issue of "whether [petitioner's] defamation of [respondent], standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment." (id., at p. 694.) Accordingly, throughout its opinion in Paul, this Court focused its analysis upon the scope of protection afforded the interest in reputation by the Fourteenth Amendment, and by corollary to the flood of Civil Rights actions that would no doubt have arisen if this Court had approved the claim urged by the Paul petitioner.

Nowhere, however, does the Paul opinion speak to the balancing test of New York Times, the scope of the First Amendment's effect upon the law of group libel, or to the competing interests involved in striking a constitutional balance between the rights of the communications media and the rights of the individual whose reputation has been bludgeoned by libel per se.

In short, while Paul v. Davis does hold that the due process clause does not "incorporate" the interest in reputation as a fundamental right thereunder, it surely does not serve to extinguish the constitutional protection already afforded this interest independently of the Fourteenth Amendment, via the balancing principles carefully crafted by this Court in New York Times and its progeny.[1/]

1/ Contrary to respondent's assertions, in their petition for certiorari, (Continued...)

Indeed, it is ironic that respondent, having argued strenuously in the lower courts that the Group Libel Rule is "a

---

1/ (Continued) petitioners did not claim that the constitutional protection for the individual's interest in reputation "finds its source in the Ninth, Tenth, and Fourteenth Amendments to the Constitution." (Respondent's Brief in Opposition, p. 3.) Rather, petitioners relied throughout upon the holdings of New York Times and Gertz, which require a balancing of the interests protected by the First, Ninth, and Tenth Amendments. In a footnote to their argument, petitioners did allude to the possibility that Fourteenth Amendment rights could be violated by certain kinds of state action that serves to deny due process of law by infringing upon the ability of plaintiffs to bring libel suits to the jury -- a question not necessarily answered by this Court's decisions in Civil Rights cases such as Paul v. Davis, supra. However, the central argument advanced throughout the body of the petition for certiorari is that the constitutional protection for the rights here asserted by petitioners flows not from the due process clause of the Fourteenth Amendment, but rather from the constitutional recognition of these rights inherent in applying the balancing test mandated by New York Times/Gertz. (See, e.g., § VI (A)(1) of the petition; see also Appendix "C" to the petition for certiorari, which sets forth only the First, Ninth and Tenth Amendments (and not the Fourteenth) as the constitutional provisions centrally involved in the instant case.)

matter of constitutional law" (See, e.g., Appellee's Responding Brief in the Ninth Circuit Court of Appeals, p. 8, first full paragraph), would now suggest for the first time that the issues here involved are merely state law matters having no constitutional significance. On the contrary, petitioners maintain that the balancing principles contemplated by the New York Times rule cannot be so one-sided as to allow the media to shield libelous statements in the lower courts by constructing an argument with a constitutional foundation, only to abandon that foundation at the Supreme Court level by arguing that the Constitution has nothing at all to do with the case.

In summary, while the holding of Paul v. Davis does preclude the due process clause as a constitutional wellspring of a Civil Rights' action based solely upon

stigma to one's reputation, that holding does not obliterate the constitutional protection afforded the individual interest in reputation by virtue of the balancing of constitutional interests inherent in the New York Times test and exemplified by the Gertz language heretofore discussed.[2/]

2/ A survey of the many circuit cases discussing the reach of Paul v. Davis reveals that they are virtually all Civil Rights actions involving the scope of the rights of the individual against actions by governmental agents and employees, and that none of them are libel cases governed by the constitutional balancing principles involved in New York Times and its progeny. (See, e.g., Mitchell v. King, 537 F.2d 393 (C.A. 10 1976) [revocation of appointment to regent does not, under Paul, deprive public official of due process]; Coliazzi v. Walker, 542 F.2d 969 (C.A. 7 1976) [Paul interpreted to hold that stigma to reputation plus discharge or failure to retire may give rise to Civil Rights claim]; Huntley v. Comm. School Bd. of Brooklyn, 543 F.2d 979 (C.A. 2 1976) [some defamations may give rise to valid due process claim where coupled with other factors not present in Paul]; Bellows v. Dainack, 555 F.2d 1105 (C.A. 2 1977) [holding that Paul does not preclude Civil Rights action based upon illegal arrest with excessive force];
(Continued...)

II. There Is A True Conflict Between The Lower Federal Courts In Interpreting The Effect Of The New York Times Standard Upon The Construction And Application Of The Group Libel Rule, Thus Creating A Lack Of Constitutional Conformity.

Respondent argues that the diverse formulations of the Group Libel Rule are

---

2/ (Continued) Bonner v. Coughlin, 545 F.2d 565 (C.A. 7 1976) [Paul interpreted as precluding plaintiff from "federalizing" tort actions against government employees]; Ventetuolo v. Burke, 596 F.2d 476 (C.A. 1 1976) [Paul interpreted as holding that a defamation claim alone is insufficient to establish Civil Rights action absent a termination of employment; Dennis v. S & S Consolidated Rural H.S., 577 F.2d 338 (C.A. 5 1978) [Paul explained as holding that defamation charge alone does not state § 1983 claim for relief, absent other governmental action with respect to plaintiff]; Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (C.A. 9 1981) [Paul interpreted to preclude Civil Rights action based solely on allegations by athlete of tongue-lashings by coach at state university].

nothing more than conflicts between the state courts over which common-law tort rule to apply, a matter admittedly beyond the jurisdiction of this Court. Yet this argument misses the point: that the formulation of the Group Libel Rule, when influenced by the local district court's interpretation of the New York Times standard, clearly does invade the realm of federal constitutional law. This is precisely what has occurred in the instant case, where respondent argued that the so-called Group Libel Rule was mandated by New York Times, and the District Court in adopting its formulation of the Group Libel Rule, expressly alluded to the "constitutional significance" of the balancing principles mandated by New York Times v. Sullivan. (See Dist.Ct. Opin., p. 1153.)[3/]

3/ Moreover, when petitioners advocated that the District Court and Ninth (Continued...)

Hence, this Court is not here presented with -- as respondent suggests -- a mere squabbling among the state ourts over which common-law tort rule to apply; but rather with a demonstrable lack of uniformity in the federal courts regarding the very nature and effect of the New York Times standard upon the formulation of the Group Libel Rule. It is this constitutional uncertainty which petitioners urge this Court to put to rest by announcing a uniform rule of constitutional interpretation. Thus, this case presents a wholly valid basis for the exercise of its jurisdiction.

3/ (Continued) Circuit should adopt Oklahoma's multi-factor approach to the Group Libel Rule, respondent argued that "adoption of the Fawcett test would return libel law to the pre-New York Times dark ages." (Appellee's brief before the Ninth Circuit, p. 13, third full paragraph.)

CONCLUSION

Respondent does not challenge any of the important legal rules and social policies set forth at length in the petition for hearing. Rather, having prevailed upon the lower courts to formulate a Group Libel Rule on the basis of the constitutional principles emanating from New York Times, respondent now argues that this case does not involve any balaning of rights of constitutional significance. As discussed here and in the petition itself, the rights of petitioners to a fair and uniform application of the New York Times standard are indeed interests of constitutional significance. Hence, and for all the reasons advanced by petitioners, this Court should grant the instant petition and address itself

to the important constitutional questions presented.

Respectfully submitted,

KENT A. RUSSELL
3169 Washington Street
San Francisco, CA 94115
Telephone: (415) 929-8301

Counsel for Petitioners

DATED: August 23, 1984